

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of the Request of Covad to
Define and Price a Line Sharing over DLC
UNE to be offered by Qwest

PUC Docket No. P-421/CI-02-293
OAH Docket No. 12-2500-14765-2

SECOND LINE SHARING OVER DLC PREHEARING ORDER

This matter came on for telephone conference before Administrative Law Judge Steve M. Mihalchick on Qwest's Motion for a Protective Order and to Limit Scope of Docket on July 18, 2002. The following persons noted their appearances at the conference:

Stephen Bowen and Anita Taff-Rice for Covad. Norton Cutler for Qwest. Steve Alpert, Assistant Attorney General, and Edward Fagerlund, Economist, for the Department of Commerce. Lesley Lehr for WorldCom.

Covad and the Department were allowed to submit briefs in response to Qwest's Motion. The briefs were received on July 26, 2002.

Based upon the record, and for the reasons stated in the following Memorandum, the Administrative Law Judge makes the following:

ORDER

1. The hearing on technical issues originally scheduled to commence August 12, 2002, is continued.
2. A telephone conference will be held August 13, 2002 at 1:00 p.m. CDT. The conference bridge number is 651-284-3547 and the conference ID number is 9544. Please call in at that time.
3. Parties asked to provide "Confidential Information" may require the requesting party to comply with the terms of the Protective Agreement and Order issued today in this matter.
4. Except as provided in the foregoing paragraph, Qwest's Motion for Protective Order and to Limit Scope of Docket is **DENIED**.
5. Qwest shall fully answer Covad information requests 2-5, 3-10, 3-11, 4-25, and 4-26.

6. Qwest shall fully answer the Department Information of Requests served on July 15, 2002.

Dated: August 8, 2002

s/Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

In the Qwest 271 application cases, Docket Nos. 1370-1375, the First Prehearing Order stated that parties asked to provide "Confidential Information" could require the requesting party to comply with the terms of the Protective Agreement entered into in the US WEST Generic Cost Case. The procedures in the 271 cases have generally applied to this docket, but the provisions of that Protective Agreement have not expressly been made applicable here.

During the course of discovery in this docket, Qwest was asked to provide data to Covad and the Department that Qwest considers to be extremely sensitive. Before providing such information, Qwest sought the agreement of Covad to return the data when this case was complete. Covad agreed. To implement that agreement, counsel for Qwest, apparently working off a copy of the Protective Agreement in the Generic Cost Case,^[1] modified section 1(g) by adding a provision requiring the return or destruction of such data at the end of the proceeding.^[2]

The Department objects to the provision requiring it to return any documents that had come into its possession. It maintains that it has never been a party to such Protective Agreements, that the confidentiality of any trade secret documents provided to it are maintained under the provisions of the Government Data Practices Act, Minn. Stat. Ch. 13, and that it is required to maintain all of its records permanently by Minn. Stat. § 138.17. The Administrative Law Judge notes that Eric Swanson, an Assistant Attorney General at the time, signed the Protective Agreement in the Generic Cost case on behalf of the Office of Attorney General. At the time of the prehearing conference on July 18, 2002, the Administrative Law Judge had not recalled that any state agency had ever signed one of the Protective Agreements.

At some point after 1997 the Protective Agreements used in proceedings before the Commission began to incorporate a paragraph expressly excluding state agencies from the provisions of the Protective Agreement and noting the fact that they were subject to the statutes controlling use and disposition of government data. See, for example, Exhibit 2, an October 14, 1999, Protective Order in OAH Docket No. 12-2500-12509-2.

The arguments of the Department are well taken. Minn. Stat. § 138.17 requires it to maintain and dispose of “government records,” which includes all data provided to it, in accordance with that statute. That statute, and Minn. Stat. Ch. 13, contain specific provisions requiring trade secret and confidential commercial and financial information to be maintained by the Department and State Archivist and not accessible to the public. Thus, it is appropriate to require parties to provide confidential information to the Department without requiring the Department to be subject to the terms of the Protective Agreement that are contrary to statute.

The Administrative Law Judge has modified the Protective Agreement proposed by Qwest to make it a Protective Agreement and Order, deleted the reference to the “Arbitration Docket”, specified a 24-hour notice period, subtitled the No Waiver paragraph, added a paragraph regarding information provided to state agencies, added signature blocks, and added an Exhibit A.

Qwest seeks a ruling that the subject matter of this docket be restricted to “the conditions under which Qwest must offer unbundled package switching. Qwest seeks a Protective Order that would restrict Covad’s discovery only to data related to that subject matter.

Covad responds that it is not requesting that the Commission unbundle packet switching per se, but is seeking access to an end-to-end fiber-fed UNE loop four line sharing. Thus, it argues, since Qwest has chosen to configure its network so that line shared traffic is carried partly on a UNE loop via packet switching, then Qwest must give CLECs access to that loop. Covad also argues it is entitled to discovery of all of the features of the equipment used in that loop so that it and other CLECs can be assured that they can access all of the features and functions supported by the equipment on an unbundled basis.

Covad’s arguments are very persuasive and are adopted by the Administrative Law Judge. It is necessary here only to highlight a few significant points.

- In its Order Acting on Certified Motions and Opening New Docket, the Commission stated that the issues in this case included what UNE’s Qwest must provide to permit line sharing over fiber-fed loops.
- The Commission has authority to order unbundled access to whatever loop Qwest uses to provide line sharing over fiber, and all of its subloop elements, even if that includes packet switching.
- Other states have reached various decisions on the issues presented here, but many of them have ruled in favor of the type of unbundling sought by Covad in this proceeding.

The information Covad seeks in information requests 2-5, 3-10, 3-11, 4-25, and 4-26 are all related to the equipment, design, and capabilities of Qwest’s line sharing over fiber architecture and is therefore appropriate for discovery. Qwest shall complete

its responses to those information requests subject to the Protective Agreement and Order.

The Department has served numerous information requests on Qwest all relating to Exhibit RHB-21 offered by Qwest in the pricing docket and additional data provided by Qwest on May 31, 2002, regarding that exhibit.

RHB-21 is a document produced by Qwest that projects costs for alternative methods of providing line sharing over fiber-fed loops. However, it disclosed nothing about the architecture used in those methods and there was no such testimony during the pricing hearing. Thus, the Department is asking for further information regarding the exhibit so that it can understand the comparisons. Again, the information sought is directly relevant to the subject matter of this docket and appropriate for discovery.

S.M.M.

^[1] A copy of the Protective Agreement in the Generic Cost Case, dated March 27, 1997, is attached as Exhibit 1.

^[2] The Protective Agreement in the Generic Cost Case already had a provision requiring the return of Confidential Information to the Providing Party in Section 3(c). The provision added by counsel for Qwest may have been redundant.